

MEMORANDUM FOR: General Counsel

SUBJECT: Executive Privilege

1. General. The so-called "executive privilege" embodies the authority of executive agencies of the Government to withhold information from the legislative and judicial branches. Such withholding, if not protected by the privilege, might result in punishment of the individuals concerned for contempt of Congress, or, in a judicial proceeding, might result in either a contempt sentence against individuals or a judgment against the Government. There seems little question that a privilege exists, but there is controversy over its application.

2. Scope. The privilege, where applicable, covers not only executive documents and records, but also the information contained therein, so that if an agency cannot be compelled to produce documents, neither can it (or its representatives) be compelled to disclose the same information in verbal testimony.

3. (a) Courts. As a practical matter, the courts are not in a position to compel the production of information, although they can confront the agency or the individual with some unpleasant alternatives. They can either subject the recalcitrant witness to contempt or they can prejudice the Government case, by a directed verdict against the Government or by refusing to permit the Government to introduce any evidence unless all relevant evidence is introduced. A survey of the cases indicates no instance in which the courts have failed to recognize the executive privilege when, in a controversy between private parties, either of the parties seeks to compel the production of Government records over the objections of the head of the executive department or agency concerned. Where the Government is party defendant, whether in a civil or a quasi-criminal action (such as habeas corpus), the same rule appears to prevail. That is to say, in neither of those instances have the Federal courts been disposed to exercise such compulsions as lie within their power to bring about disclosure. A different situation exists, however, when the Government is party plaintiff whether the action is criminal or civil. In substance the rule is this: The executive branch may withhold records in the national interest but may not attempt a criminal prosecution or law suit on the basis of partial records only. The courts feel that such a proceeding would be inequitable and apply an "all or nothing" rule on disclosure.

(b) The general rule in the Federal courts appears to be that an employee of an executive department or agency, properly acting under general regulations of his department or agency head in refusing to disclose information, is not subject to punishment for contempt. Conceivably, a different result might be reached if the head of the department or agency were himself before the court. The question whether such head is amenable to judicial process cannot be said to have been definitively answered. Assertions are often made that he is not, and there is no clear judicial precedent either way. Perhaps, however, this is an academic question to consider for this reason: just as a subordinate is considered to be acting properly if he obeys his department head, so would the department head in all probability be considered to be acting properly if he were obeying the President, and it is settled that the President himself is amenable to no process.

4. Congress. The Congress, since it is not adjudicating adversary proceedings, has only one direct weapon to punish withholding of information--contempt. In practice, Congress has bowed numerous times to the assertion of the executive privilege by the President and even by department heads. The Congress has never held an employee of the executive branch in contempt for refusing to divulge official information.

5. Caveat. Many facets of executive privilege remain unclear. Voluminous studies have been made, some allegedly non-partisan and some intensely partisan on one side or the other. Because of the nebulous character of the privilege, the factual situation is extremely important. Broad, and probably valid, generalizations have been made above; but there are gaps in the law, and in individual cases the courts might take a position inconsistent with, or, at least unforeseen by, these generalities.

6. Conclusions. The individual most requiring protection is the subordinate in an executive department or agency who may be called before a court or the Congress. Judicial precedent indicates that his position will be much stronger if he can point to a standing regulation on the books of his agency justifying his withholding of information. The courts especially seem well impressed by such regulations because they indicate that the information sought is of a type customarily protected, this in contrast to the situation where the head of a department concerns himself to prohibit the release of specific information.

7. Recommendation. It is recommended that the Agency adopt a general regulation covering the disclosure of information (a proposed draft is attached).

Assistant General Counsel

Attachment:

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